No. 16244.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERIC O. SONNTAG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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I.
Introduction.

This brief is submitted in reply to the brief of the government filed herein. In it appellant will undertake to bring to the attention of the court certain fallacies in the government's position.

II.
The District Court Erred in Denying Appellant's Motion Brought Under Rule 17(b), 18 U. S. C. A., to Subpoena Witnesses at the Government's Expense.

This point of appeal was initially raised and discussed by appellant in point II, pages 12 to 26, of his opening brief. Appellant at those pages urged that the trial court erred as a matter of law in concluding that appellant's affidavit was insufficient to satisfy the requirements of

Rule 17(b), Title 18, U. S. C. A. The government, at pages 9 through 13 of its brief, argues the point as though it involved the usual question of an abuse of discretion on conflicting facts. Thus it is stated at page 13 of appellee's brief:

> "In the case at bar the contents of appellant's affidavit were questioned by appellee's counter-affidavit and, in reviewing the evidence before it, as contained in said affidavits, the Court resolved the motion in appellee's favor. This the Court had the discretionary right to do."

The aforesaid statement is not only nonresponsive to appellant's argument but also is basically erroneous in the premise upon which appellee has chosen to found its argument. Appellant, therefore, while reiterating his basic original contention that the error was one of legal interpretation, requests the indulgence of this Honorable Court and asks that he be permitted to widen his ground of appeal to answer the government's argument that appellant's motion below was properly denied by the trial court in a valid exercise of its judicial discretion after considering conflicting evidence as presented by cross affidavits.

The government argues that the appellant's motion was adversely decided by the court after "reviewing the evidence before it, as contained in said affidavits" (Govt. Br. p. 13). The conflicting affidavits referred to by the government consist of two affidavits by appellant, one of which was set out in material part at pages 14 and 15 of appellant's opening brief, and a supplemental affidavit contained at pages 41 and 42 of the Clerk's Transcript[1] along with the affidavit of Eugene N. Sherman, the Assistant United States Attorney in charge of this case.

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[1]This affidavit is contained in Appendix "A" of this brief.

An examination of the three affidavits compels the conclusion that there was, in fact, no conflicting evidence presented to the trial court but rather that the only admissible evidence of which the court could properly take cognizance was that contained in appellant's two affidavits. The affidavit of Mr. Sherman constituted the only attempt of the government to put evidence before the court on the question of whether or not appellant was an indigent; *ergo,* any evidence considered by the court in favor of the government's position must come from said affidavit, which reads as follows:

"State of California, County of San Diego—ss.

"Eugene N. Sherman, being duly sworn, deposes and says:

"That he is an Assistant United States Attorney charged with the responsibility of representing the Government in the above entitled case.

"That in connection therewith he caused an investigation to be made of the credit rating of the instant defendant. That Affiant has been informed and believes and therefore alleges that said investigation revealed that on February 6, 1957, the defendant submitted a report to Dun & Bradstreet which said report showed the following:

"1. That the defendant averaged $40,000.00 per year gross volume;

"2. That after withdrawals from the business by the owner he operated at the break even point;

"3. That his business furnished the defendant with a fair living;

"4. That his inventory was valued at $1,000.00 and the fixtures and equipment contained therein at $2,000.00;

"5. That the building in which said business was located was owned by defendant jointly with his wife

and that said building was valued at $16,750.00, with an encumbrance of approximately $16,000.00;

"6. That the defendant's liabilities total $500.00 including overhead and accrued expenses;

"7. That the defendant owned a residence at 5310-12 South Normandie Avenue, Los Angeles, California, valued at $4,000.00 and encumbered in the amount of $7,800.00. with monthly payments in the amount of $150.00.

"Affiant further states that he has personally read the income tax returns of the defendant for the years 1954, 1955 and 1956; that said returns show that defendant grossed between approximately $25,000.00 to $40,000.00 during said years from said business.

"That Affiant is informed and believes and therefore alleges that as of February, 1957, defendant maintained a commercial account at a local Los Angeles bank with a balance running from high two to low three figures, and that defendant still maintains said account.

Eugene N. Sherman

Eugene N. Sherman"

It is to be noted that following a recital that Mr. Sherman is an Assistant United States Attorney charged with the responsibility of representing the government in this case (which appellant concedes) and that, as such, he caused an investigation to be made of appellant's credit rating (appellant has no information as to the accuracy of this statement but assumes it *arguendo*) Mr. Sherman's affidavit on page 39 of the Clerk's Transcript, lines 13 *et seq.,* alleges on *information and belief* that the investigation revealed that on February 7, 1957, appellant submitted a report to Dun and Bradstreet which contained divers information. There follows *still on information and belief* an enumeration of items the Dun and Brad-

street report allegedly contained. It is not until line 8 of page 40 of the Clerk's Transcript that Mr. Sherman alleged directly, of his own personal knowledge, that he had read appellant's income tax returns for the years 1954 through 1956 and that said returns showed a *gross* dollar volume of business conducted by appellant of between $25,000.00 and $40,000.00 per year. It is significant that, since Mr. Sherman admits that he had access to appellant's income tax returns, he did not set forth appellant's *net* profit rather than his *gross* income.) Having finally emerged from the murky atmosphere of information-belief allegations briefly, affiant promptly wtihdraws into the same obscurity alleging on information and belief on page 40, lines 13 *et seq.,* that as of February, 1957, appellant maintained a commercial account at a Los Angeles bank with a balance running from "high two to low three figures" and that appellant still maintained that account.

A verification upon information and belief is quite a different thing from either a direct allegation of a fact or an allegation of the truth of a fact to the best knowledge of the affiant.

> *State v. Whitaker* (1929), 34 N. M. 477, 284 Pac. 119.

The latter allegations are positive in their character, stemming as they do from the personal knowledge of the affiant; while the former allegation is, at best, mere hearsay and not competent evidence even in those cases where evidence may be supplied by affidavit. It is apparently well established that those portions of an affidavit which are made on information and belief are hearsay and of no evidentiary value. As stated in

> 22 Cor. Jur. 207:
>
> "* * * A statement otherwise objectionable as hearsay does not become competent because it has been reduced to writing."

In

2 C. J. S. 981,

it is stated:

> "* * * the averments must be direct and positive and not on information and belief * * * where the affidavit is required for use as evidence, such statements generally being merely hearsay and barred by the rules of evidence governing hearsay * * *"

The court in

Kellett v. Kellett (1934), 2 Cal. 2d 45, 39 P. 2d 45,

stated at page 48 of the California Report:

> "As evidence, an affidavit made upon information and belief is hearsay and no proof of the facts stated therein."

See also on this point:

Franklin v. Nat C. Goldstone Agency (1949), 33 Cal. 2d 628, 204 P. 2d 37;

Jeffers v. Screen Extras Guild, Inc. (1955), 134 Cal. App. 2d 622, 286 P. 2d 30;

Bank of America v. Williams (1948), 89 Cal. App. 2d 21, 200 P. 2d 151;

Pratt v. Robert S. Odell & Co. (1944), 63 Cal. App. 2d 78, 146 P. 2d 504;

Pelegrinelli v. McCloud River etc. Co. (1905), 1 Cal. App. 593, 82 Pac. 695.

The rationale for this rule is expressed in—

1 Cal. Jur. 672,

wherein it is stated:

> "But where one is testifying as to something that has transpired, he can ordinarily testify only as to those facts which he knows of his own knowledge,

> and it is immaterial whether, in this connection, his testimony be taken by affidavit, deposition or oral examination. So, affidavits to be used as evidence which are made upon information and belief are hearsay and afford no competent evidence of the facts alleged therein."

See also cases contained on this point in note 18, page 672, of the above work.

In the light of the foregoing, it is the contention of appellant that the only evidentially admissible portions of Mr. Sherman's affidavit which the court could properly have considered were (a) that Mr. Sherman was an Assistant United States Attorney, (b) that Mr. Sherman was charged with the conduct of the instant case for the government, and (c) that Mr. Sherman read appellant's tax returns for the years 1954 through 1956 and they showed appellant's gross income to be between $25,000.00 and $40,000.00 for those years. It is submitted that none of these positive allegations are relevant to the point in issue—appellant's indigency—(a) and (b) for obvious reasons, and (c) for the reason that a person's *gross* income is not indicative in any way of that person's *net* profit and current worth.

The fact that appellant grossed $40,000.00 a year is in no way inconsistent with appellant's allegation that he was an indigent. Assuming, however, *arguendo* that Mr. Sherman's affidavit was admissible evidence, it is submitted that it contains no evidence properly considered in a determination of appellant's financial status on June 5, 1958 (the date of both the motion and the affidavit). From the face of the affidavit it appears that the alleged report to Dun and Bradstreet was prepared on February 6, 1957, some 16 months prior to the date of appellant's motion. Much could happen in the 16-month interval; indeed, as it appears from both of appellants affidavits [Clk. Tr. pp.

19-23 and 41-42], appellant spent much of his money for the defense of his case and had encountered financial difficulties in the operation of his business. What appellant's financial condition may or may not have been 16 months prior to the time that he made a motion as an indigent defendant under Rule 17(b) has not the slightest relevancy to his financial condition at the time he claimed to be an indigent and made the motion.

Assuming further *arguendo* that the affidavit was evidentally admissible and that the information contained in the Dun and Bradstreet report had some relevance in time to appellant's financial condition on June 5, 1958, it is appellant's position herein that rather than contradicting appellant's assertion that he was on June 5, 1958, an indigent the affidavit fortifies such contention. Paragraph 1 states that appellant averaged $40,000.00 a year *gross;* but paragraph 2 reveals that, despite the above gross, appellant's business "operated at the break even point." Paragraph 3 states that appellant had "a fair living" from business; however, no attempt is made to define what a "fair living" is, or what annual income is necessary to sustain such a status. Attorney's fees and costs of litigation (including the $4,000.00 necessary to produce the witnesses in question) are relatively fixed and, in the case of a man doing a $40,000.00 a year gross in a high-overhead business such as the mail order sale of rare birds and animals difficult and expensive to procure, could prove quite staggering.

Paragraph 4 states that appellant's business contained a $1,000.00 inventory and two thousand dollars worth of equipment and fixtures. Even assuming that appellant by forced sale could realize these values from his inventory and fixtures, the total thus obtained would have been insufficient to produce the witnesses. In addition, it is appellant's contention that Rule 17(b) does not contemplate that in order to qualify as an indigent a defendant

must sell or liquidate his only means of livelihood. Paragraph 5 states that appellant and his wife jointly owned the building where the business was conducted. (The fact is appellant and his wife had had an equity of $750.00 in said building which had been foreclosed by June, 1958).

For the reasons heretofore set forth, appellant submits that such factors do not destroy his assertion of indigency. Paragraph 6 contains merely a statement that defendant's liabilities were $500.00. Such statement serves only to buttress the contention that he was an indigent. Paragraph 7 states that appellant owned a residence in Los Angeles which was valued at $4,000.00 and encumbered in the amount of $7,800.00. (Appellant had also had his interest in this building foreclosed by June, 1958.) In the next to last paragraph of the affidavit it is stated that the affiant had read appellant's income tax returns from 1954 through 1956 and that said returns showed that appellant grossed between $25,000.00 and $40,000.00 during said years. As heretofore pointed out, it is significant that with the income tax returns available to affiant affiant did not state appellant's net income during said years.

In the last paragraph of the affidavit, it is stated that appellant maintained a commercial account at a Los Angeles bank in which the balance ran from a "high two to low three figures." Appellant contends that the fact that a man might have between $75.00 and $125.00 in the bank does not disqualify him from classification as an indigent under Rule 17(b), U. S. C. A.

As heretofore argued at pages 19 through 23 of appellant's opening brief, it is not necessary for one to be a pauper to be an indigent.

Adkins v. E. I. Dupont de Nemours & Co. (1948), 335 U. S. 331, 93 L. Ed. 43;

Goodall v. Brite (1936), 11 Cal. App. 2d 540, 54 P. 2d 510;

Dupue v. District of Columbia, 45 App. D.C. 54;

In re Hybart, 119 N. C. 359, 25 S. E. 963;

Massachusetts Gen. Hospital v. Inhabitants of Belmont, 233 Mass. 190, 124 N. E. 21;

People v. Board of Supervisors, 121 N. Y. 345, 24 N. E. 830;

21 Words and Phrases 152, 153;

42 C. J. S. 1363.

Appellant could not pay the $4,000.00 necessary to produce the witnesses and still provide himself and his dependents with the necessities of life. He was an indigent within the meaning of Rule 17(b).

Under the foregoing authorities the purported counter affidavit filed by the government at the hearing on appellant's motion under Rule 17(b) was of no evidentiary effect and could not have properly been considered by the trial court in determining the motion. However, the government takes the position that the court did rely upon said affidavit in determining the motion, it being stated at page 10, footnote 7, of the government's brief that—

> "'In making its ruling the Court expressly referred to the information pertaining to appellant's financial condition which appellee had set forth in its counter-affidavit (A. 31-32)."

It is not, therefore, left to speculation whether the trial court was influenced by the government's affidavit, since the government expressly urges such to be the case. Where, as here, the ruling of the trial court was tinged by reliance upon an incompetent affidavit, error has been committed to the prejudice of the defendant and the case must, in the interest of justice, be reversed.

Appellant does not concede the validity of appellee's argument that no prejudice was worked upon him by the denial of his motion under Rule 17(b). This point is extensively covered at pages 24 and 25 of appellant's opening brief and will not be further pressed here. Suffice it to say that appellant was forced into stipulated testimony and cross-examination without being accorded a correlative right of cross-examination of the government's stipulation witnesses. The Honorable Judges of this Court being men of great trial experience either on the bench, at the bar, or both, do not require appellant to point out to them the disadvantage of relying on "paper testimony" in the place of testimony of "live witnesses." When it is considered that the government for the purpose of "trial tactics" brought witness Frankenfield [Tr. 158-180], a non-indictment witness, from Perkasie, Pennsylvania, to Los Angeles, to give maudlin testimony concerning the loss by her two young sons of some $5.00 earned by delivering papers and dishwashing, it ill becomes the government now to protest righteously against requiring the public to pay necessarily heavy costs on behalf of defendant (Govt. Br. p. 11, quoting *United States v. Kinzer,* 98 Fed. Supp. 6). The inequities are apparent. Error was committed in not permitting appellant the privilege of having the government pay for the production of his witnesses. Prejudice resulted from this failure, and the case should on this ground alone be reversed.

III.

The Conviction Must Be Reversed Because in the Light of the Evidence Taken as a Whole the Evidence Is More Consistent With Innocence Than With Guilty and the Conviction, Therefore, Clearly Erroneous.

This point was thoroughly discussed by appellant at pages 26 through 56 of his opening brief. The government in answering at pages 15 and 16 of its brief seeks to invoke the well known rule that appellate courts are not retriers of the facts. The government does not, however, answer or distinguish the rules set out in

United States v. United States Gypsum Co., 333 U. S. 364, 92 L. Ed. 746,

and other cases cited at page 27 of appellant's opening brief, which permit appellate review of the entire evidence of cases tried before a judge and futher permit reversal of the trial judge where his findings are clearly erroneous based upon such a review.

The instant case is a case within this rule, and appellant feels confident that this Honorable Court, upon a review of the evidence, will agree with his basic premise, viz., that a business is not operated as a scheme to defraud, absent direct evidence thereof, where 99 per cent of said business is satisfactorily conducted and only 1 per cent results in loss to customers. In so stating this premise, appellant is mindful of the line of cases represented by

Blanton v. United States (1914), 213 Fed. 320,

and

Barnes v. United States (1928), 25 F. 2d 61,

which hold that the fact that one portion of a business is legitimately operated is no defense to the fraudulent operation of another portion of that business.

These cases are distinguishable. In each of the cases supporting the aforesaid rule, there was some valid ground of distinction between the fraudulent and legitimate portions of the business other than the mere fact of loss to the customers in certain of the transactions. For instance, the *Barnes* case, *supra*, deals with the sale of worthless securities by mail. In the over-all scheme to unload worthless securities, *some* good securities were sold. The same thing occurred in *Blanton v. United States, supra,* in regard to soldier's script. However, in both of these cases and in the other cases in this line, the worthelessness or value of the respective securities was known to the defendants at the commencement of each individual transaction. Such facts do not apply in this case. Rather than the loss to the customers resulting from a fraudulent intent of appellant at the inception of each transaction, the loss here was caused by intervening circumstances. In each case at the outset appellant possessed no intent to defraud. He did not say to himself, for example: "I will defraud the customers in the Champlin and Frankenfield transactions, but I will legitimately carry out my commitments with Mr. Thompson."

In each case, appellant at the inception of the transaction intended either to supply the pets or return the money. It was the intervening cause of business reverses, lax business practices, or the peculiar nature of the mail order pet business which resulted in the losses which occurred in one per cent of his total business—not fraudulent intent. There is no showing that defendant filled orders for Mynah birds but ignored orders for monkeys and parakeets. Nowhere, despite the claims of the government to the contrary (Govt. Br., pp. 6 and 19) is there anything which would support the theory that appellant filled all local orders and ignored out-of-town orders. (It is of interest to note that the transactions relied upon to prove this unique theory involved only two "local" customers,

and they are local only in the sense that their businesses are located in Southern California—one in Oxnard, and one in Bakersfield [Tr. 322, 323, 394, 458, 459; Govt. Br. p. 6].) The most that can be said is that in one per cent of his business transactions (based on gross dollar volume) appellant neither returned the customer's money nor supplied him with the merchandise ordered. Such a situation is not to be commended and constitutes lax business practice; but, absent, as it is, a plan systematically to mulct the public, it does not constitute fraud.

The nature of appellant's business must again be considered in determining whether a fraudulent connotation can be logically drawn from the facts of this case. Pets, unlike inanimate merchandise, cannot be stocked by a small retailer in amounts sufficient to accommodate every conceivable demand. This especially is true where the sale of the pets is carried out on a nationwide scale by mail. Pets must be fed. Pets must be watered. They must be extensively cared for both when healthy and when ill from any of the myriad of strange diseases to which nonindigenous species are subject. Pets cannot be stacked row on row on a shelf or in a storeroom. Pets cannot be shipped in a routine manner but require special skill and care in packaging to insure their arrival alive and in good health. Pets, in short, are extremely consuming of the time, space, and money of one engaged in the pet business. Because of this, of crucial importance in the pet business is the computation of how many to keep on hand at any given time to satisfy anticipated demands. If one overestimates demand, the surplus stock can not be stored indefinitely without disaster. The over optimistic pet retailer can literally be eaten out of house and business. In addition, the maintenance of large numbers of pets in cramped quarters in the presence of other strange species subject to a variety of diseases is an invitation to wholesale depopulation of the stock through death. The pet dealer then labors under an un-

usually compelling necessity to anticipate exactly the short term demands likely to be made upon his stock. This is extremely difficult in the case of the retail pet dealer who draws his clientele from an ascertainable local area; but in the case of the nationwide wholesale mail order dealer the problem is almost overwhelming.

Unlike, for instance, Sears Roebuck, Montgomery Ward, or New Process, Inc., or other large mail order houses selling inanimate merchandise, it is impossible for a mail order pet dealer to predict just what the nationwide demand for any one species of animal will be in any given time quantum. Unlike sales of perfumes, toothpaste, etc., pets are not a staple item with a relatively uniform rate of consumption. The demand for pets, on the contrary, fluctuates widely as fads for certain species come and go and the individual desire for something arises. Accordingly, when appellant would receive one dozen parrots in stock and would initially advertise them for sale he would have no way of knowing then whether he would receive orders for one parrot or one hundred parrots in response to his advertisement. If the former, he would be stuck with eleven voracious delicate parrots; if the latter, he would be faced with the urgent necessity of unearthing eighty-eight additional birds.

This latter situation deserves further attention. With cognizance of the possibility of orders in excess of his stock on hand, appellant would, when orders exceeded supply, seek to obtain the pets from secondary sources such as other pet stores and dealers to fill his orders. It was, perhaps, here that appellant made his gravest business error. Since he was operating on an exceedingly slim profit margin, he would upon receipt of payment immediately deposit the money in his account while he was attempting to fill the order. In a great majority of cases this arrangement worked very well; but in cases representing

one per cent of his gross business he could neither fill the order nor at the end of the 45-day period did he have the cash to make a refund to the customer. It is this one per cent of the business which gives rise to the government's case. However, it should be borne in mind at all times that appellant never solicited orders he did not intend to fill. He at all times had the pets "in stock for immediate shipment" at the time he placed his advertising [Tr. 449]. The inherent difficulties of the business in which appellant was engaged caused the defaulcations by appellant. Appellant's defaulcations in one percent of the gross dollar volume of his business cannot in the premises be considered fraudulent unless the court is prepared to rule that any inability to fill orders or return money in the conduct of a mail order pet business is *per se* fraudulent. Such an interpretation would place an unsupportable burden on anyone in the mail order business and would be in direct conflict with the decided cases:

Evans v. United States (1894), 153 U. S. 584, 592, 38 L. Ed. 830, 833 (Appellant's Op. Br., p. 54);

Gold v. United States (C.C.A. 8th, 1929), 36 F. 2d 16 (Appellant's Op. Br., p. 56);

Corliss v. United States (C.C.A. 8th, 1925), 7 F. 2d 455;

Harrison v. United States (C.C.A. 6th, 1912), 200 Fed. 662, 671 (Appellant's Op. Br., p. 56).

Appellant is undoubtedly civily liable to those persons whose orders were not filled or money returned. He may possibly be culpable of lax business methods. However, appellant was, on the facts of this case, not criminally guilty of fraud and the judgment so convicting him must be reversed.

In concluding this point, appellant wishes to correct any erroneous impressions which may have arisen from certain

misstatements in the government's brief. On page 7 of the government's brief, counsel for the government quotes a letter written by appellant. It is unfortunate that the government would stoop to attempt to distort a layman's unfortunate attempt at humor into an admission of guilt. Appellant denies that the letter was ever so intended.

Appellant is familiar with the opinion of this Honorable Court in

> *Penosi v. United States* (9th Cir., 1953), 206 F. 2d 529,

cited and quoted at page 18 of the government's brief but submits that in that case the defendant's guilt of the narcotics offense charged was firmly established by the circumstantial evidence. This is not true in the instant case.

Penosi was arrested with marked government money and other evidence of the narcotic trade in his possession. He was arrested in conjunction with a codefendant who actually possessed the narcotics. In the instant case on much weaker circumstantial evidence the government attempts to establish a fraudulent *state of mind.* The circumstances so relied upon support with at least equal force the conclusion that the perils of the mail order pet business and not any fraudulent intent were the cause of the defalcations. Where, as in the instant case, the circumstances relied upon by the prosecution to make out a defendant's guilt are not only equally consistent with innocence but more consistent with innocence, the rule enunciated in the *Penosi* case lacks applicability.

At page 19 of its brief, the government chooses to characterize appellant's business as a "wide scale fraudulent mail order business." Considering the use of the term "wide scale," appellant concedes that he did a nationwide legitimate mail order business. However, if the government means by the term "wide scale" to describe the number of cases in which appellant defalcated, appellant wishes

again to remind the court that these abuses occurred in only one per cent of the gross dollar volume of his business. This, it is submitted, is a far cry from conducting a "wide scale fraudulent mail order business."

Again at page 19 of its brief, the government asserts without reference to or foundation in, the record that appellant knew at the time he placed his advertising that he would neither deliver the pets nor refund the money advanced. This statement is not true. As heretofore stated, appellant at all times had the pets in stock when he advertised them as being available [Tr. 449]. The government has not seen fit to contradict this testimony beyond the unsworn statement of government counsel, which, of course, is not evidence.

At page 20 of the government's brief, the government seeks to assign as appellant's major premise in explanation of the defalcations a cargo embargo instituted by Pan American Airways. While this embargo was, of course, one of the contributing factors to appellant's difficulties, it was not the principal one. The inherent nature of the mail order pet business itself was at the root of appellant's problems. In this connection it should be observed that the government's statement (at page 20 of its brief) that the embargo did not apply to cargo service is both a distortion and a half truth since the shipments of appellant which were affected by the embargo originated in South America. It is true that the embargo did not cover cargo planes, but there were no cargo planes originating in South America. All Pan American cargo from South America had to be carried, if at all, as cargo on passenger flights. Passenger flights were affected by the embargo [Tr. 352, 355, 357].

Finally, on pages 20 and 21 of the government's brief, it is alleged that appellant has taken an inconsistent position in urging simultaneously on one hand that his business is successful enough so that he did not have to defraud individuals of small amounts and, on the other hand, that

lack of funds prevented repaying his creditors. Appellant cannot see the alleged inconsistency. It can well be (and is here) that a person may not be making a pronounced financial success of his business yet still be too honest to set about to intentionally defraud coustomers for his personal gain. It is not reasonable to think that person intent on fraud would attempt to conduct his fraudulent scheme from the same location for ten years, working long hours seven days a week without a vacation, all for a total gain over ten years beside his living of less than $800.00. The picture is much more consistent with a poor but honest man struggling to establish a small business which would ultimately supply him and his family with the necessities of life.

The trial court erred in holding appellant guilty of fraud under the facts of this case.

Conclusion.

The trial court erred, as a matter of law, in holding insufficient appellant's affidavit in support of his motion under Rule 17(b), 18 U.S.C.A. The motion was not decided on the evidence presented by conflicting affidavits since the only allegations not made on information and belief in the government's affidavit were immaterial to the issue, it being well established that those portions of an affidavit which are alleged upon information and belief do not constitute evidence. The material points of the government's affidavit, even if admissible as nonviolative of the hearsay rule, were irrelevant in point of time to appellant's financial status at the time of the hearing on the Rule 17(b) motion since said points were based on a report made by appellant 16 months prior to the date of the motion. In any event, the facts contained in the government's affidavit, if admissbile and relevant, themselves established appellant as an indigent since they showed him to be the debt ridden operator of a business which was

just breaking even financially. One does not have to be a pauper to be an indigent, and appellant's financial position at the time of his motion under Rule 17(b) was such that he could not afford to use $4,000 for witnesses and still attempt to provide himself and his dependents with the necessities of life. For these reasons the trial judge erred in not granting appellant's motion under Rule 17(b), thus forcing appellant into a prejudicial stipulation with the government. The case should be reversed on this ground.

Furthermore, appellant defalcated in only one per cent of the gross dollar volume of his business over the period of the indictment. The total dollar value of the defalcation was somewhat under $800.00. Appellant's difficulties were occasioned by business reverses, cargo embargoes, lax business practices, limited capital, and the inherent nature of the mail order pet business.

In the premises, it is submitted that a defalcation of one per cent of the gross dollar volume of a business over a three year period does not constitute fraud and for this most basic reason the judgment of conviction must be reversed.

Respectfully submitted,

THOMAS H. LUDLOW, JR.,

Attorney for Appellant.

APPENDIX "A"

Supplemental Affidavit of Eric O. Sonntag in Support of Motion Pursuant to Rule 17(b) Federal Rules of Criminal Procedure.

United States District Court for the Southern District of California, Central Division.

United States of America, Plaintiff, vs. Eric O. Sonntag, Defendant. (No. 26583 CD.)

State of California, County of San Diego—ss.

ERIC O. SONNTAG, being first duly sworn, deposes and says:

1. That he is the defendant in this case and makes this affidavit in his behalf pursuant to Rule 17(b) of the Federal Rules of Criminal Procedure in order to supplement the affidavit heretofore made by him in support of this motion.

2. That his attorney has advised him that in his opinion the cost subpoenaing the witnesses referred to in the affidavit heretofore submitted by him in support of this motion (Exhibit "A," Par. 7) might be as much as two thousand dollars.

3. That he does not have two thousand dollars at his disposal or the major part thereof.

4. That he believes that he cannot borrow this sum or any substantial part thereof.

5. That he has obligated himself to pay additional attorney's fees for the defense of this case and will be in the debt of his attorney for said fees as they accrue; that the charge made of him by his attorney for defense of this case was $500.00 as a retainer fee, which he has paid, and

$150.00 per day for each day of trial, which he has not paid; and that it has been estimated that this case will take ten days of trial time.

/s/ ERIC O. SONNTAG
ERIC O. SONNTAG

Subscribed and sworn to before me this 5th day of June, 1958.

JOHN A. CHILDRESS,
Clerk, U. S. District Court,
Southern District of California,
By WILLIAM W. LUDDY, Deputy.
(SEAL)